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Supreme Court, U.S.
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No. 02-93

In the Supreme Court of the United States

JAMSHID ZAMAN, an individual; MAHVASH ZAMAN, an individual; BEHROUZ ZAMAN, an individual; ZAMAN, INC., a California corporation, d/b/a BEVERLY HILLS MOTORWORKS; and AFFORDABLE CARS, INC., a California corporation,
Petitioners,

v.

ATLANTIC RICHFIELD COMPANY, a Delaware corporation; FOX & FIELDS, a general partnership; ROBERT J. FOX, an individual; JERRY FIELDS, an individual; LAWRENCE R. ANSLEY, SR., an individual; and MARGARET ANSLEY, an individual,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT ATLANTIC RICHFIELD COMPANY'S BRIEF IN OPPOSITION

LOUIS E. KEMPINSKY
Counsel of Record
PEITZMAN, GLASSMAN, WEG & KEMPINSKY LLP
1801 AVENUE OF THE STARS
SUITE 1225
LOS ANGELES, CA 90067
(310) 552-3100

Counsel for Respondent Atlantic Richfield Company

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED FOR REVIEW

1. Where the undisputed evidence established, as both lower courts found, that Respondent Atlantic Richfield Company ("Atlantic Richfield") had a direct pecuniary and personal stake in the underlying litigation, did Atlantic Richfield have Article III standing to maintain suit under 42 U.S.C. § 6972, the citizen-suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq*.?

2. Does the attorneys' fee provision of RCRA unfairly advantage the plaintiff in a RCRA lawsuit when the defendant may, if it is an aggrieved party, assert its own claim under RCRA (either as a counterclaim, cross-claim, or otherwise) and, if it prevails, recover attorneys' fees under the same standard applicable to a prevailing plaintiff?[1]

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[1] Although this is an issue raised in the body of the Petition for Writ of Certiorari, it was not an issue raised before either of the lower courts, nor was it designated as a question presented for review. It should therefore not be considered by the Court in deciding whether to grant the writ. This is just one of several procedural and substantive infirmities in Petitioners' submission. Additional examples are provided *infra*, any one of which constitutes a basis for denial of review. *See* Sup. Ct. R. 14(4).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Atlantic Richfield hereby identifies all of its parent corporations and any publicly held company that owns 10 percent or more of its stock: (1) BP America, Inc.; and (2) BP p.l.c.

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OPINIONS BELOW

Atlantic Richfield objects to Petitioners' incomplete citation of opinions and orders entered in the case by the lower courts. Both the "Opinions Below" section and the Appendix in the Petition for Writ of Certiorari ("Petition") omit the *Order Denying Defendants' Motions Pursuant to Fed. R. Civ. P. 59* ("Order"), entered by the United States District Court for the Central District of California ("District Court") on August 8, 2000. The Order addresses the precise issue as to which Petitioners seek review. It sets forth the District Court's findings and conclusions regarding the existence of Atlantic Richfield's Article III standing to bring the RCRA action, the challenge of which Petitioners did not initiate until *after* the District Court's entry of judgment in favor of Atlantic Richfield.

The Order is set forth in the Appendix to this Opposition at pages 1b through 9b. Pursuant to Sup. Ct. R. 14(1)(d) and 14(1)(i) (specifically, Rules 14(1)(i)(i), 14(1)(i)(ii), and/or 14(1)(i)(vi)), Petitioners were specifically required to cite the Order and to include it in the Appendix to the Petition. Petitioners' failure to do so is, in and of itself, a sufficient reason for the Court to deny the Petition. *See* Sup. Ct. R. 14(4).

The District Court's *Findings of Fact and Conclusions of Law,* entered on May 4, 2000, is set forth at pages 5a-53a of the Appendix to the Petition.[2] The District Court's *Final Judgment and Permanent Injunction*, entered on May 23, 2000, is set forth at pages 56a-61a of the Appendix to the Petition.

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[2] To distinguish between the two appendices, all references to "RA: __" are to the Appendix to the Opposition. All references to "PA: __" are to the Appendix to the Petition.

The *Memorandum Opinion* of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") affirming the District Court's entry of judgment in favor of Atlantic Richfield and against Petitioners, filed on January 16, 2002, is set forth at pages 1a-4a of the Appendix to the Petition. The Ninth Circuit's Order denying Petitioners' petition for rehearing and rehearing en banc, filed on March 12, 2002, is set forth at pages 54a-55a of the Appendix to the Petition.

No prior orders or opinions have been reported.

STATEMENT OF THE CASE

In 1979, two of the petitioners, Jamshid Zaman and Mahvash Zaman, acquired the real property commonly known as 8800 Burton Way in Beverly Hills, California ("Property"). *See* PA: 9a. Following their acquisition of the Property, Jamshid Zaman operated a gasoline service station on the site. *See* PA: 9a-10a. Later, petitioner Behrouz Zaman operated a car repair and mechanic shop on the site. *See* PA: 11a. In recent years, petitioner Affordable Cars, Inc. has operated a car rental business at the Property. *See* PA: 15a.

By the mid-1980s, Petitioners had allowed the Property to become contaminated with thousands of gallons of gasoline and waste oil. *See* PA: 11a-12a. Petitioners did nothing to clean up the Property, allowing the unremediated contamination to begin to migrate off site. *See* PA: 16a-17a, 19a. Instead, Petitioners sought to shift the blame for the contamination to Atlantic Richfield. Petitioners accused Atlantic Richfield, which had owned the Property for a number of years prior to selling it in 1979, of contaminating the Property and demanded that Atlantic Richfield undertake at its own expense the clean-up. *See* PA: 7a, 9a, 15a-17a; RA: 6b.

Upon learning of the existence of the contamination, Atlantic Richfield engaged in extensive good-faith negotiations with Jamshid Zaman and his representatives concerning a potential agreement to remediate the Property. *See* PA: 16a. Atlantic Richfield also took steps to assess the site, as well as to remove the most dangerous contaminants. *See id.* Atlantic Richfield spent in excess of $200,000 in connection with these site assessment and remediation activities, much of which was done in response to agency orders directed to Jamshid Zaman. *See id*

Efforts by Atlantic Richfield over seven years to reach an agreement with Petitioners regarding the clean-up of the Property were unsuccessful, as Petitioners persisted in their refusal to take appropriate steps to remediate the Property. Confronting this intransigence, the threat of agency action directed against Atlantic Richfield, and the possibility of litigation from adjoining landowners, Atlantic Richfield initiated in October 1994 the process (by giving the 90 days' required notice) preparatory to filing a suit for injunctive relief under RCRA.[3] *See* PA: 17a.; RA: 5b-7b.

Following a lengthy trial that began in March 2000, the District Court found Petitioners to be responsible for 100% of the gasoline and waste oil contamination at the Property. *See* PA: 20a-34a. The District Court concluded that the evidence justified the issuance of an injunction pursuant to RCRA to ensure the Property would be remediated. *See* PA: 35a, 40a-

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[3] Under RCRA, "any person may commence a civil action on his own behalf . . . against any person . . . who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

41a. The District Court thereafter on May 23, 2000 entered its *Final Judgment and Permanent Injunction*. *See* PA: 56a. Only at this point did Petitioners raise for the first time the issue of Atlantic Richfield's Article III standing, asserting it as a ground for their motion to vacate the judgment under Fed. R. Civ. P. 59. *See* RA: 4b. The District Court denied the motion, and, in so doing, it augmented its findings, based on the testimony adduced at trial, to address the standing issue. *See* RA: 5b-7b.

The Petition is premised on a persistent and fundamental misstatement of the factual record before the District Court and the Ninth Circuit. Petitioners are flatly wrong in asserting that: (1) the Ninth Circuit "has decided Atlantic Richfield's Article III standing in reliance on evidence not in record"; and (2) "[p]rior to this lawsuit, the Petitioners did not contend that Atlantic Richfield was responsible for the contamination and did not demand that the company help cover remediation costs." Petition at 3-4. In point of fact, Jamshid Zaman's representative Ali Ebrahimi testified at trial through a videotaped deposition that Jamshid Zaman approached Atlantic Richfield in the mid-1980s because he maintained that Atlantic Richfield had caused the contamination and should bear the clean-up costs.[4] *See* PA: 16a-17a.

Furthermore, while Petitioners acknowledge that the District Court denied their motion to vacate the judgment based upon Atlantic Richfield's alleged lack of standing, *see* Petition

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[4] The District Court's Findings of Fact and Conclusions of Law indicated that "[t]he Court received the testimony of Eli [*sic*] Ebrahimi by way of videotaped excerpts of deposition testimony." Appendix to Petition at 6a, 46a n. 3. Excerpts from the transcript of Mr. Ebrahimi's deposition testimony were included as pages 590-600 of the Supplemental Excerpts of Record filed by Atlantic Richfield with the Ninth Circuit.

at 2, they fail to set forth the District Court's findings on the standing issue either in the body of their Petition or in the Appendix thereto. In denying Petitioners' motion to vacate the judgment, the District Court stated that its Findings of Fact "did not expressly address the issue of standing because (1) standing had never been challenged until the filing of the Rule 59(e) motion, and (2) because the record so clearly showed that [Atlantic Richfield] had standing." RA: 5b

In its Findings of Facts and Conclusions of Law and in its Order denying the motion to vacate the judgment, the District Court found that the contamination, unless remediated, would continue to migrate off-site and cause off-site contamination. *See* PA: 19a; RA: 5b-6b. In holding that Atlantic Richfield had standing to pursue its RCRA claim, the District Court found that the contamination implicated Atlantic Richfield as a prior owner of the Property because: (1) "[i]t is possible that owners of adjacent property might sue [Atlantic Richfield] if contamination emanating from the Property contaminated their Property"; (2) "[Petitioners] claimed that [Atlantic Richfield] was responsible for the contamination at the Property and sought to have [Atlantic Richfield] pay for the costs of remediating the Property"; and (3) a public agency, the Regional Water Quality Control Board (the "RWQCB"), was seeking to have the Property remediated and could have issued an enforcement order naming all potentially responsible parties including Atlantic Richfield, but "did not do so, in part, because it believed that [Petitioners] were proceeding with remediation." RA: 5b-6b.

The District Court then found that, if Petitioners had remediated the Property, "[Atlantic Richfield] would not be subject to suit from adjacent neighbors and would not be subject to an RWQCB enforcement action," and "[Atlantic Richfield's] potential liability to [Petitioners] would have been

lower." RA: 6b-7b. Accordingly, the District Court found that: (1) "[r]emediation of the Property decreases the likelihood of lawsuits from adjacent neighbors and decreases [Atlantic Richfield's] financial exposure"; and (2) "[r]emediation of the Property removes the threat of an RWQCB enforcement action." RA: 7b. The District Court therefore concluded that "[Atlantic Richfield] had standing under Article III of the Constitution and under 42 U.S.C. § 6972(a)." RA: 7b.

The Ninth Circuit found that there was a real controversy giving Atlantic Richfield standing to sue because "[Petitioners], through their representative Ebrahimi, contended that Atlantic Richfield was responsible for the contamination and demanded that the company help cover remediation costs." PA: 3a. Having found this to be a sufficient basis to confer Article III standing, the Ninth Circuit did not need to address whether the other two controversies identified by the District Court also constituted injuries in fact giving Atlantic Richfield the requisite standing to sue. *See id.*

ARGUMENT

I. NO COMPELLING REASON EXISTS TO GRANT CERTIORARI.

Under Rule 10 of the Supreme Court Rules, a petition for a writ of certiorari "will be granted only for compelling reasons" in the Court's discretion. Sup. Ct. R. 10. Petitioners cannot show that the Ninth Circuit's unpublished Memorandum Opinion decided an important federal question in a way that conflicts with decisions from this Court or other federal appellate courts. *See* Sup. Ct. R. 10(a), (c). Nor can Petitioners show that the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or

sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

At most, Petitioners contend that the District Court and the Ninth Circuit committed a factual error in finding that Atlantic Richfield suffered injury in fact giving it standing to sue. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Neither error, in any event occurred in this case. The application of well-settled constitutional principles to the undisputed evidence compelled the Ninth Circuit to affirm the District Court's finding that Atlantic Richfield possessed the requisite standing to pursue its RCRA claim.

II. THE NINTH CIRCUIT'S FINDING THAT ATLANTIC RICHFIELD HAD STANDING COMPORTS WITH THIS COURT'S OPINIONS.

The determination of whether a plaintiff has standing to bring suit under a statute begins with an examination of the legislative intent. It is axiomatic that "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S. Ct. 1601, 1608, 60 L. Ed. 2d 66 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). This is what Congress has done in 42 U.S.C. § 6972(a), the citizen-suit provision of RCRA under which Atlantic Richfield proceeded, which broadly confers standing upon "any person." As one court explained:

> . . . The text [of Section 6972(a)] could not be more clear as to the statute's scope: "any

> person," including [the plaintiff], can sue "any person," including the United States and its officers, for any violation of "any of [RCRA's] . . . requirements." [42 U.S.C. § 6972(a).] In light of the extraordinary breadth of this statutory language, [the plaintiff] most certainly *could have* filed a citizen-suit.
>
> A recent Supreme Court case makes this very point. As the Court explained in *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997), with regard to the citizen-suit provision of the Endangered Species Act, a conferral of standing upon "any person" is "an authorization of remarkable breadth." *Id.* at 1162. It applies to "*all* the causes of action" created by the statute, and "there is no textual basis for saying that its expansion of standing requirements applies to environmentalists alone." *Id.* at 1163 (emphasis added). . . .

Brem-Air Disposal v. Cohen, 156 F.3d 1002, 1004 (9th Cir. 1998) (emphasis in original) (footnote omitted). *See Citizens for a Better Environment v. Caterpillar*, 30 F. Supp. 2d 1053, 1072 n.5 (C.D. Ill. 1998) (because RCRA authorizes "any person" to commence a suit, a RCRA plaintiff's standing may not be challenged under the prudential "zone of interest" requirement).

Apparently recognizing this authority, Petitioners do not dispute that RCRA confers standing upon Atlantic Richfield or challenge Atlantic Richfield's standing as a prudential matter. Instead, Petitioners premise their challenge upon the baseline standing requirements imposed by Article III, Section 2 of the United States Constitution. *See* Petition at 6-7.

For purposes of Article III standing, three requirements must be met: (1) "there must be alleged (and ultimately proven) an 'injury in fact' – a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not "conjectural" or "hypothetical"'"; (2) "there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant"; and (3) "there must be redressability – a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04, 118 S. Ct. 1003, 1016-17, 140 L. Ed. 2d 210 (1998) (citation omitted).

A. Atlantic Richfield Proved Injury In Fact.

Atlantic Richfield brought suit to protect its own financial interest in ensuring that the Property was remediated as expeditiously as possible. "Pecuniary injury is clearly 'a sufficient basis for standing.'" *Central Arizona Water Conservation Dist. v. United States Envtl. Protection Agency*, 990 F.2d 1531, 1537 (9th Cir.) (citation omitted), *cert. denied*, 510 U.S. 828, 114 S. Ct. 94, 126 L. Ed. 2d 61 (1993). *See generally* 15 J. Moore, *Moore's Federal Practice*, § 101.40[5][a] (3d ed. 2002) ("[p]ecuniary interest clearly provides a sufficient basis for standing") (footnote omitted). Furthermore, where the plaintiff has Aan actual stake in the outcome that goes beyond 'intellectual or academic curiosity,' . . . even a minor or non-economic injury will satisfy the strictures of Article III." *Family & Children's Center, Inc. v. School City of Mishawaka*, 13 F.3d 1052, 1058 (7th Cir.) (citation omitted), *cert. denied*, 513 U.S. 961, 115 S. Ct. 420, 130 L. Ed. 2d 335 (1994).

The evidence introduced at trial showed that the standing requirements were met for at least three different injuries suffered by Atlantic Richfield. Each of these injuries

resulted directly from Petitioners' continuing failure to remediate the Property. Any one of these three injuries, taken alone, would be sufficient to create Article III standing.

First, Atlantic Richfield had standing because Petitioners claimed that Atlantic Richfield was responsible for the contamination, and Petitioners' continued failure to commence remediation was increasing the amount of damages that might have been assessed against Atlantic Richfield. Second, Atlantic Richfield had standing because the contamination at the Property, unless remediated, would continue to migrate off-site, creating the potential that nearby property owners would sue Atlantic Richfield for contamination of their property. Third, Atlantic Richfield had standing because the RWQCB would, as a matter of policy, have issued an order requiring Atlantic Richfield to clean up the Property if it were not otherwise remediated.

Threat of Suit by Petitioners. As both the District Court and the Ninth Circuit held, Petitioners' own claims that Atlantic Richfield was responsible for the contamination at the Property constituted an injury in fact giving Atlantic Richfield standing. This contention gave Atlantic Richfield a strong pecuniary interest in ensuring that the contamination was remediated as expeditiously and inexpensively as possible. *See Kemper Prime Indus. Partners v. Montgomery Watson Americas, Inc.*, 2000 U.S. Dist. LEXIS 11450 at *2, 6, 18 (N.D. Ill. June 26, 2000) (holding that a defendant alleged to have financial responsibility for contamination at a property had suffered an injury in fact that was "concrete and particularized and actual or imminent" and therefore supported a RCRA claim).

Threat of Suit by Adjacent Landowners. Atlantic Richfield also established injury in fact through evidence

demonstrating a likelihood that the owners of down-gradient property might sue Atlantic Richfield if their property were contaminated by gasoline or waste oil emanating from the Property. Ralph Moran of Atlantic Richfield testified to the existence and significance of this likelihood. Indeed, counsel for Atlantic Richfield received a letter dated September 15, 1997 from counsel for the owner of the land directly to the south of the Property, who threatened to sue Atlantic Richfield if any contamination from the Property migrated to its parcel.[5]

The fact that no adjacent landowner has yet sued Atlantic Richfield does not mean there was no injury in fact. "Injury sufficient to meet the standing requirement may be actual or threatened, . . . and may involve a contingent risk of injury." *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 491-92 (9th Cir. 1987) (citing *Heckler v. Mathews*, 465 U.S. 728, 738, 104 S. Ct. 1387, 1394, 79 L. Ed. 2d 646 (1984)). "'[O]ne does not have to await the consummation of threatened injury to obtain preventive relief'"; "'[i]f the injury is certainly impending that is enough.'" *Bland v. Fessler*, 88 F.3d 729, 736 (9th Cir.) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308-09, 60 L. Ed. 2d 895 (1979)), *cert. denied*, 519 U.S. 1009, 117 S. Ct. 513, 136 L. Ed. 2d 403 (1996).

Threat of Agency Enforcement Action. Atlantic Richfield suffered an injury in fact as a result of the actions of the RWQCB. As the District Court found: (1) the RWQCB was seeking to have the Property remediated; (2) "[t]he RWQCB could have issued an enforcement order requiring remediation

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[5] Mr. Moran's testimony and the letter from counsel may be found at pages 690-91 and page 686, respectively, of the Supplemental Excerpts of Record filed with the Ninth Circuit by Atlantic Richfield.

but did not do so, in part, because it believed that [Petitioners] were proceeding with remediation"; and (3) "[t]he enforcement order would have named all potentially responsible parties including [Atlantic Richfield]." RA: 6b. This finding was supported by the testimony of former RWQCB official James Ross that the RWQCB would, as a matter of "standard operating procedure," have named all potentially responsible parties – including Atlantic Richfield – in an enforcement order.[6]

B. The Undisputed Evidence Demonstrated That Atlantic Richfield's Injury In Fact Was Caused By Petitioners' Failure To Remediate The Property.

The requirement of "a causal relationship between the injury and the challenged conduct" means "that the injury 'fairly can be traced to the challenged action of the defendant,' and has not resulted 'from the independent action of some third party not before the court.'" *Northeastern Florida Chapter of Assoc. General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663, 113 S. Ct. 2297, 2302, 124 L. Ed. 2d 586 (1993) (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1926, 48 L. Ed. 2d 450 (1976)).

The causation prong of the standing test is met in this case. Atlantic Richfield's RCRA claim was based upon Petitioners' continuing failure to undertake the remedial efforts necessary to abate the imminent and substantial threat to health or the environment caused by the contamination at the

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[6] Mr. Ross' testimony may be found at pages 750-51 of the Supplemental Excerpts of Record filed with the Ninth Circuit by Atlantic Richfield.

Property. Petitioners' failure to remediate the Property directly caused each of the three injuries in fact identified by Atlantic Richfield. As the District Court found, if Petitioners had remediated the Property as appropriate: (1) it would have "decrease[d] the likelihood of lawsuits from adjacent neighbors and decrease[d] [Atlantic Richfield's] financial exposure"; (2) "Atlantic Richfield's potential liability to [Petitioners] would have been lower"; and (3) it would have "remove[d] the threat of an RWQCB enforcement action." RA: 6b-7b.

C. Injunctive Relief is Likely to Redress the Injuries in Fact Identified by Atlantic Richfield.

The requirement of "a likelihood that the injury will be redressed by a favorable decision" means "that the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative.'" *Northeastern Florida Chapter of Assoc. General Contractors of America*, 508 U.S. at 663-64, 113 S. Ct. 2297, 2302, 124 L. Ed. 2d 586 (quoting *Allen v. Wright*, 468 U.S. 737, 752, 104 S. Ct. 3315, 3325, 82 L. Ed. 2d 556 (1984)). "[P]laintiffs 'must show only that a favorable decision is *likely* to redress [their injuries], not that a favorable decision *will inevitably* redress [their injuries].'" *Graham v. Federal Emergency Mgmt. Agency*, 149 F.3d 997, 1003 (9th Cir. 1998) (citation omitted).

As the District Court found, *see* RA: 6b-7b, the injunctive relief it ordered does much to redress the injuries in fact identified by Atlantic Richfield. Requiring Petitioners to take the steps necessary to prevent any imminent or substantial threat to health or the environment will make it considerably less likely that other property owners will sue Atlantic Richfield for contamination of their property. *See id.* In the event that the District Court had found that Atlantic Richfield

was responsible for any contamination at the Property – which it ultimately did not – the injunctive relief sought by Atlantic Richfield would have decreased the cost of remediation and thereby would have decreased the amount of damages that could be imposed on Atlantic Richfield. *See* RA: 7b. *See also Kemper Prime Indus. Partners*, 2000 U.S. Dist. LEXIS 11450 at *2, 6, 18 (holding that a defendant alleged to have financial responsibility for contamination at a property had shown redressability with regard to its RCRA claim by asserting that its "exposure for the clean-up will be greatly reduced, if not eliminated," if the court ordered remediation of the property). Similarly, the injunctive relief ordered by the District Court made it unnecessary for the RWQCB to issue an enforcement order requiring Atlantic Richfield to remediate the Property. *See* RA: 6b-7b.

In *Davis v. Sun Oil Co.*, 148 F.3d 606, 610-13 (6th Cir.), *cert. denied*, 525 U.S. 1018, 119 S. Ct. 543, 142 L. Ed. 2d 451 (1998), defendants argued that res judicata barred plaintiffs from pursuing a federal claim for injunctive relief under RCRA because they had already obtained injunctive relief in a state court action. *See id.* The Sixth Circuit noted that "[i]t would be possible to reformulate [the defendant's] theory as a challenge to the [plaintiffs'] standing to bring their RCRA action – specifically, as an assertion that the [plaintiffs] fail to meet the 'remedial benefit' requirement of standing." *Id.* at 610 n.4. The Sixth Circuit found that defendants could not have prevailed on such a theory "because the [plaintiffs] may benefit from the pressure placed on [the defendant] to remedy the pollution by the daily-accruing penalties." *Id.* The likelihood that Atlantic Richfield would benefit from an injunction entered by the district court is considerably greater than the likelihood that the *Davis* plaintiffs would have benefitted from the relief sought in the federal lawsuit.

III. CERTIORARI SHOULD NOT BE GRANTED BASED UPON PETITIONERS' ARGUMENT THAT RCRA MORE READILY AUTHORIZES AN AWARD OF ATTORNEYS' FEES TO A PLAINTIFF THAN TO A DEFENDANT.

Without including the issue as a question presented for review, Petitioners suggest that certiorari should be granted because a RCRA plaintiff may more readily recover attorneys' fees than a RCRA defendant, thereby giving a party an incentive to initiate a RCRA suit. *See* Petition at 13-15. However, Petitioners did not raise this issue before the Ninth Circuit. Accordingly, the Court should decline to consider the issue for the first time through a writ of certiorari. *See generally* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction 2d*, § 4036, at 35 & nn. 67-68 (1988 & supp. 2002) (noting "the general rule that new questions may not be raised for the first time on Supreme Court review").

In any event, Petitioners' argument fails on the merits. RCRA authorizes a court "to award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." 42 U.S.C. § 6972(e). If a defendant in a RCRA lawsuit believes that a plaintiff or other party is responsible for the contamination at a site, the defendant may file a RCRA counterclaim, cross-claim, etc. against the culpable party.[7] Should the defendant prevail on its RCRA claim by proving that another party is responsible for the contamination, it will have the benefit of RCRA's more

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[7] Indeed, Petitioners filed an amended counterclaim asserting a RCRA claim against Atlantic Richfield, but the District Court ultimately dismissed the RCRA claim as barred by the statute of limitations.

lenient standard for recovering attorneys' fees even though it asserted its RCRA claim in a capacity other than as plaintiff. The RCRA attorneys' fee provision gives no advantage to the first to bring suit. The same standard applies to whomever is successful in obtaining relief against a party responsible for creating the risk sought to be remedied by the statute.

CONCLUSION

For the reasons stated herein, Atlantic Richfield respectfully asks the Court to deny the Petition.

DATED: August 19, 2002

Respectfully submitted,

LOUIS E. KEMPINSKY
PEITZMAN, GLASSMAN, WEG &
KEMPINSKY LLP
1801 AVENUE OF THE STARS
SUITE 1225
LOS ANGELES, CA 90067
(310) 552-3100

Counsel for Respondent Atlantic Richfield Company

APPENDIX 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV-95-566-ABC (AJWx)

[Filed August 4, 2002]
[Entered August 8, 2002]

Atlantic Richfield Company,	)
	)
Plaintiff,	)
	)
v.	)
	)
Jamshid Zaman, et al.,	)
	)
Defendants.	)
	)
	)
And Related Cross-Actions.	)
	)

ORDER DENYING DEFENDANTS' MOTIONS PURSUANT TO FED. R. CIV. P. 59

After reviewing the materials submitted by the parties and the case file, the Court DENIES Defendants' Motions Under Fed. R. Civ. P. 59(b) and 59(e).

Order Denying Defendants' Motions
Pursuant to Fed. R. Civ. P. 59

I. Procedural Background

This matter was tried to the Court March 7 through April 19, 2000. The court issued Findings of Fact and Conclusions of Law on May 3, 2000. The court filed a Final Judgment and Permanent Injunction on May 22, 2000.

Defendants Jamshid Zaman, Mahvash Zaman, Behrouz Zaman, and Affordable Cars, Inc. (the "Zaman Parties") filed the instant motions on June 7, 2000. The first motion is a motion to vacate, alter, or amend the judgment pursuant to Fed. R. Civ. P. 59(e). The Zaman Parties' Rule 59(e) motion is based on the grounds that (1) the Court lacks subject matter jurisdiction and (2) there was insubstantial evidence to hold the separate Zaman Parties liable. The second motion is a motion for new trial pursuant to Rule 59(b). The Rule 59(b) motion is based on the grounds that (1) the Court erred in its evidentiary ruling concerning the belated discovery of the 55-gallon drum and (2) there was a lack of substantial evidence. Plaintiff Atlantic Richfield Company ("ARCO") and Counter-Defendants Lawrence and Margaret Ansley oppose.

II. Discussion

A. Rule 59 Standard

A motion under 59(e) "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange Street Partners v. Arnold*, 179 F. 3d 656,

665 (9th Cir. 1999). "Reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *McDowell v. Calderon*, 197 F. 3d 1253, 1255 n. 1 (9th Cir. 1999) (quoting 11 Charles Alan Wright, et al., *Federal Practice and Procedure: Civil 2d* § 2810.1 (1995)).

Pursuant to Rule 59(b), a district court may grant a new trial upon a timely motion. General grounds for a new trial include: (1) that the verdict is against the weight of the evidence, (2) that the damages are excessive, or (3) that the trial was unfair, either in light of the substantial errors in the admission or exclusion of evidence, or erroneous instruction of the jury. *See* 11 Charles Alan Wright, et al., *Federal Practice and Procedure: Civil 2d* § 2805 *et. seq.* (1995). When evaluating a motion for a new trial based on error, the Court's inquiry is twofold: (1) whether an error was in fact committed and (2) whether that error was so prejudicial that denial of a new trial would be "inconsistent with substantial justice." Fed R. Civ. P. 61. Thus, before granting a new trial, the district court must be convinced that the error adversely affected or tainted the verdict.

The burden of proof on a new trial motion rests on the moving party. *Anglo-American Gen. Agents v. Jackson Nat. Life Ins. Co,*. 83 F.R.D. 41, 43 (N.D. Cal. 1979). A motion under Rule 59 is committed to the district court's sound discretion. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980); *389 Orange Street Partners*, 179 F. 3d at 665; *Metromedia Co. v. Fugazy*, 983 F. 2d 350 (2d Cir. 1992).

Finally, a Rule 59 motion "may not be used. . . to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance." *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F. 3d 396, 403 (4th Cir. 1998) (describing Rule 59(e) standard); accord *389 Orange Street Partners*, 179 F. 3d at 665; 11 Wright, *supra*, § 2805 (describing Rule 59(b) standard).

B. The Court has jurisdiction.

For the first time in this litigation, the Zaman Parties argue that this Court has no subject-matter jurisdiction over this case. Specifically, they argue that ARCO has no standing to sue as required by Article III of the United States Constitution.

Although the Zaman Parties bring up this argument for the first time after trial, the prohibition against raising arguments for the first time does not generally apply to jurisdictional questions because subject matter jurisdiction goes to the heart of whether this Court has power to issue a judgment in the first place. If the Court has no subject matter jurisdiction, any judgment issued by the Court would be void.

Of course, where there is an honest concern about jurisdiction, it is incumbent on the party to challenge that jurisdiction as early as possible. As the parties are aware, this case, which spanned five years, placed a substantial burden on the resources of this Court and of the parties. But even if the Court were to assume that Zaman Parties had permitted the

Court to waste its resources on a matter that they suspected all along was not properly before this Court, the Court would have to vacate the judgment if it determined that subject matter jurisdiction was lacking.[1]

The Court, however, finds that the Zaman Parties' contention lacks merit. The Court's finding that it had subject matter jurisdiction, (Conclusions of Law ¶ 1), is fully supported by the record. The Zaman Parties argue that because the Court did not make express findings of fact and conclusions of law about ARCO's standing that the judgment must be vacated. In all honesty, the Court did not expressly address the issue of standing, because (1) standing had never been challenged until the filing of the Rule 59(e) motion, and (2) because the record so clearly showed that ARCO had standing. To clarify any doubts, the Court makes the following additional findings:

1. ARCO is a person for purposes of 42 U.S.C. § 6972 of the Resource Conservation and Recovery Act ("RCRA").

2. The gasoline and waste oil contamination on the Property is a continuing threat to human health and the environment. The unremediated contamination has moved off-site and will continue to move off-site unless action is

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[1] At the same time, if it was just a matter of a trial record that lacked evidence to support the issue of standing, the Court would first grant Plaintiff the opportunity to meet its burden of showing that it had standing.

taken. If the Property is not remediated, the groundwater will continually be recontaminated with seasonal cyclic rise and fall of the water table. (Findings of Fact ¶ 56.)

3. It is possible that owners of adjacent property might sue ARCO if contamination emanating from the Property contaminated their property. (Moran Testimony.)

4. The Zaman Parties claimed that ARCO was responsible for the contamination at the property and sought to have ARCO pay for the costs of remediating the Property.

5. The Regional Water Quality Control Board ("RWQCB") was seeking to have the water remediated. (Ross Testimony.)

6. The RWQCB could have issued an enforcement order requiring remediation but did not do so, in part, because it believed that the Zaman Parties were proceeding with remediation. (Ross Testimony; Findings of Fact ¶ 57.)

7. The enforcement order would have named all potentially responsible parties including ARCO. (Ross Testimony.)

8. If the Zaman Parties had remediated the Property, ARCO would not be subject to suit

from adjacent neighbors and would not be subject to an RWQCB enforcement action.

9. If the Zaman Parties had remediated the Property, ARCO's potential liability to the Zaman Parties would have been lower.

10. Remediation of the Property decreases the likelihood of lawsuits from adjacent neighbors, and decreases ARCO's financial exposure.

11. Remediation of the Property removes the threat of an RWQCB enforcement action.

Based on these findings, the Court finds that ARCO had standing under Article III of the Constitution and under 42 U.S.C. § 6972(a).

C. There is sufficient evidence to support the judgment.

Both of the Zaman Parties' motions argue that there is insufficient evidence to hold Behrouz Zaman on the gasoline contamination, Jamshid Zaman on the waste oil contamination, Mahvash Zaman on any contamination, and Affordable Cars on any contamination. The Court disagrees. The Court finds that there is sufficient evidence to support judgment against each of the Zaman Parties.

The Court also notes that for the first time in their reply on the Rule 59(e) motion, the Zaman parties argue that the Court should apportion the amount of contamination

among each of the Zaman Parties. The Zaman Parties could have brought this argument at trial or earlier. Accordingly, the Court refuses to consider the argument. *See 389 Orange Street Partners*, 179 F. 3d. at 665. The Court's holding that the Zaman Parties are jointly and severally liable for the full amount of the contamination on the site stands.

D. The Court did not err in sanctioning the Zaman Parties for spoliation of evidence.

Finally, the Zaman Parties argue that the Court erred in sanctioning them for their handling of the 55-gallon drum that they discovered during the pendency of this litigation. The Court finds that no error was committed. Furthermore, the Court makes the following observations:

1. There was no procedural impediment preventing Plaintiff from making its motion when it did. Moreover, the Zaman Parties challenged the "timeliness" of the motion when it was first made and the Court found that the spoliation motion was proper.

2. The Court's ruling and sanction was limited and targeted at the specific violation at issue. Moreover, even without the presumption,[2] the

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[2] The Court notes that the sanction consisted solely of a "rebuttable presumption that the sampling, had it been done by Arco's expert, would have been positive for Arco and would have been detrimental to the Zamans." (RT 1414-15.)

Court would have reached the same conclusion. (*See* Findings of Fact ¶ 97.)

III. Conclusion

For the foregoing reasons, the Court DENIES the Zaman Parties' Rule 59 motions.

SO ORDERED,

DATED: August 4, 2000

/s/_____
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE